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[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 3221.]

On petition for rehearing. Petition denied.

For former opinion, see 60 S. E. 767.

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STUART et al. v. R. C. HOFFMAN & CO. et al.

June 11, 1908.

[61 S. E. 757.]

**1. Costs—Persons Liable—Attorneys' Fees—Payment from Fund in Court.**—Where parties to a suit, unrepresented by counsel, reap the benefit of services rendered in the progress of a cause, it is proper that those who receive the benefit should be required to make just compensation; but, except in rare instances, the power of the court to require one party to contribute to the fees of counsel of another party must be confined to cases where plaintiff suing in behalf of himself and others of the same class discovers or creates a fund which inures to the common benefit of all, and a fee is properly allowed where the services of counsel have preserved a fund to be shared in with those in like interest and unrepresented by counsel.

**2. Same.**—An insolvent and its receiver were represented by counsel in suits to establish liens against the insolvent. After a decision in favor of one lien claimant, the attorneys of other lien claimants and of the insolvent and of the receiver appealed, and the lien claimant was defeated. The attorneys of the other claimants sought to recover for their services payable out of the fund secured for the benefit of all creditors. By arrangement between the attorneys of the various parties, the attorneys of the other lien claimants argued the cause on appeal, though the other counsel were ready and able to support the appeal. Held, that the attorneys of the other lien claimants were entitled to fees payable out of such fund.

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NORFOLK RY. & LIGHT CO. v. HIGGINS.

June 11, 1908.

[61 S. E. 766.]

**1. Negligence—Contributory Negligence—Children—Instructions.**—In case of injury of a boy between 11 and 12 years old, the jury should be plainly instructed that, being under the age of 14 but over 7 years of age, he was to be presumed incapable of contributory negligence, but the presumptions might be overcome by the evidence and circumstances of the case tending to prove his maturity and capacity; and an instruction that such presumption might be overcome by evidence that he had "more than the average capacity of children